Supreme Court of the United States.

CUNNINGHAM, SHERIFF v. NEAGLE.

Upon an appeal to the Supreme Court from the action a circuit court upon a writ of *habeas corpus*, the Supreme Court must examine the evidence taken in the circuit court, to sustain or defeat the right of the petitioner to his discharge.

A deputy United States Marshal who kills a person assaulting a Circuit Judge while traveling his Circuit, is entitled to a writ of *habeas corpus*, when arrested by the State officials under a charge of murder.

Any duty of a deputy United States Marshal, which is fairly inferable from his office, when legally performed, is an act done in pursuance of a law of the United States, and entitles him to release from arrest by State authorities, performance charging the act to be a crime.

A deputy United States Marshal charged with the execution of the laws of the United States, has the powers of a peace officer and may use force in the performance of his duty.

United States Marshals are ministerial officers, and part of the executive department of the government, with duties beyond those specially prescribed by Acts of Congress, and arising from the Constitution itself.

The President has authority derived from his office, to protect the Judges of the United States Courts in the discharge of their duty, without calling upon State officials: and when he uses the civil power, the Department of Justice is the proper one to direct the means of protection.

Appeal from the United States Circuit Court for the Northern District of California. The facts are stated in the opinion.

Hon. *G. A. Johnson*, Attorney General of California, *S. Shellabarger*, *J. M. Wilson* and *Z. Montgomery* for the appellant.

Hon. *W. H. H. Miller*, Attorney General of the United States, *Joseph H. Choate* and *James C. Carter*, for the appellee.

MILLER, J., April 14, 1890. This is an appeal by Cunningham, Sheriff of the County of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said Sheriff, who held him a prisoner on a charge of murder. On the 16th day of August, 1889, there was presented to Judge SAWYER, the Circuit Judge of the United States for the Ninth Circuit,

embracing the Northern District of California, a petition signed, "DAVID NEAGLE, Deputy United States Marshal," by A. L. Farish on his behalf. This petition represented that the said Farish was a deputy-marshal duly appointed for the Northern District of California by J. C. Franks, who was the Marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition, and at the time of filing it, a duly-appointed and acting Deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, Sheriff of said County, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:

In the Justice's Court of Stockton Township.

STATE OF CALIFORNIA } *s.s.*
COUNTY OF SAN JOAQUIN }

The people of the State of California to any sheriff, constable, marshal, or policeman of said State, or of the County of San Joaquin:

Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said County of San Joaquin on the 14th day of August, A. D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought, shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof, you are therefore commanded forthwith to arrest the above-named Stephen J. Field and David Neagle, and bring them before me, at my office in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the County.

Dated at Stockton, this 14th day of August, A. D. 1889.

H. V. J. SWAIN, *Justice of the Peace.*

The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin county, California. Dated August 15, 1889.

H. V. J. SWAIN, *Justice of the Peace.*

The petition then recites the circumstances of a rencounter between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter, and of what led to it, will be considered with more

particularity hereafter. The main allegation of this petition is that Neagle, as United States Deputy-Marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable STEPHEN J. FIELD, a Justice of the Supreme Court of the United States, been in attendance upon said Justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge FIELD, and in defense of the life of the Judge, the homicide was committed for which Neagle was held by Cunningham. The allegation is very distinct that Justice FIELD was engaged in the discharge of his duties as Circuit Justice of the United States for that Circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the circuit court at that place. The allegation is also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It is also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham is in violation of the laws and Constitution of the United States, and that he is in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farish and presented to Judge SAWYER, he made the following order:

> Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before United States Circuit Court for the Northern District of California.
>
> SAWYER, *Circuit Judge.*

The writ was accordingly issued and delivered to Cunningham, who made the following return:

COUNTY OF SAN JOAQUIN, } *Sheriff's Office.*
STATE OF CALIFORNIA, }

To the honorable Circuit Court of the United States for the Northern District of California :

I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the Justice's Court of Stockton Township, State of California, County of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto, and made a part of this return.

Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded. August 17, 1889.

THOMAS CUNNINGHAM, *Sheriff*,
San Joaquin County, California.

Various pleadings and amended pleadings were made, which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of *habeas corpus;* and Neagle filed a traverse to the return of the Sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered, when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge SAWYER and District Judge SABIN. The Sheriff, Cunningham, was represented by *G. A. Johnson*, Attorney General of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the Court, on which, after a full consideration of the subject, the Court made the following order:

In the matter of DAVID NEAGLE. On *Habeas Corpus.*

In the above-entitled matter, the Court, having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the Court that the allegations of the petitioner in his amended answer or traverse to the return of the Sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody.

From that order, an appeal was allowed, which brings the case to this Court, accompanied by a voluminous record of

all the matters which were before the Court on the hearing. (See 28 AMERICAN LAW REGISTER, 585).

If it be true, as stated in this order of the Court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court.

Section 753 of the Revised Statutes reads as follows:

> The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

Rev. Stat. U. S. §§ 751, 752, give power to the Supreme Court, the Circuit and District Courts, and the several Justices and Judges of said Courts to issue writs of *habeas corpus*.

And section 761 declares that when, by the writ of *habeas corpus* the petitioner is brought up for a hearing, the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This, of course, means that if he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the circuit court from any court of justice or judge inferior to the circuit court in a certain class of *habeas corpus* cases. But

there was no appeal to the Supreme Court in any case, except where the prisoner was the subject or citizen of a foreign State, and was committed or confined under the authority or law of the United States, or of any State, on account of any act done or omitted to be done under the commission or authority of a foreign State, the validity of which depended upon the law of nations. But afterwards, by the act of Congress of March 3, 1885 (23 Stat. at Large, 437), this was extended by amendment as follows:

> That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section.

The preceding section here referred to is section 763, and is the one on which the prisoner relies for his discharge from custody in this case.

Section 763 provides, among other cases, for the issuing of writs of *habeas corpus* by the circuit courts on petition of persons alleged to be restrained of their liberty in violation of the Constitution or laws of the United States.

It will be observed that in both the provisions of the Revised Statutes and of this latter act of Congress, the mode of review, whether by the circuit court of the judgment of an inferior court or justice or judge, or by this Court, of the judgment of a circuit court, the word "appeal," and not "writ of error," is used; and, as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case, on both law and facts, is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner, Neagle, had its origin

in a suit brought by William Sharon, of Nevada, in the Circuit Court of the United States for the District of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing possessed and exhibited by her, purporting to be a declaration of marriage between them under the Code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge SAWYER, the Circuit Judge for that Circuit and Judge DEADY, United States District Judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered, granting the prayer of the bill. In that decree, it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be indorsed 'Canceled,' and that the clerk write across it, 'Canceled,' and sign his name and affix his seal thereto." The rendition of this decree was accompanied by two opinions; the principal one being written by Judge DEADY, and a concurring one by Judge SAWYER. They were very full in their statement of the fraud and forgery practiced by Miss Hill, and stated that it was also accompanied by perjury, and, inasmuch as Mr. Sharon had died between the hearing of the argument of the case, on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc.*

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the

clerk to be canceled, but she continued to insist upon its use in the State court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the Circuit Court for the Northern District of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging, also, the inter-marriage of Miss Hill with David S. Terry, of the City of Stockton, in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief. This case was argued in the Circuit Court before FIELD, Circuit Justice, SAWYER, Circuit Judge, and SABIN, District Judge. While the matter was held under advisement, Judge SAWYER, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge SAWYER, and had her husband change seats so as to sit directly in front of the Judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking a seat by her husband's side, said:—

> I will give him a taste of what he will get by and by. Let him render this decision if he dares.

The decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that—

> The best thing to do with him would be to take him out into the bay and drown him.

These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us. This was August 14, 1888. On the 3d

of September the Court rendered its decision, granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice FIELD, and during its delivery a scene of great violence occurred in the court-room. It appears that shortly before the Court opened on that day, both the defendants in the case came into the court-room and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice FIELD, there were present on the bench Judge SAWYER and Judge SABIN, of the District Court of the United States for the District of Nevada.

The defendants had denied the jurisdiction of the Court originally to render the decree sought to be revived, and the opinion of the Court necessarily discussed this question, without reaching the merits of the controversy. When allusion was made to this question, Mrs. Terry arose from her seat, and, addressing the Justice who was delivering the opinion, asked, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. Mr. Justice FIELD said :—

Be seated, madam.

She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice FIELD had been bought, and wanted to know the price he had sold himself for ; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice FIELD then directed the Marshal to remove her from the court-room. She asserted that she would not go from the room, and that no one could take her from it. Marshal Franks proceeded to carry out the order of the Court by attempting to compel her to leave, when Terry, her husband, arose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the Marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a

bowie-knife, when he was seized by persons present, and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the Marshal, and Terry was allowed to rise, and was accompanied by officers to the door leading to the Marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal, and others present, to prevent him from using it; and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in Court. For this conduct both Terry and his wife were sentenced by the Court to imprisonment for contempt,—Mrs. Terry for one month and Terry for six months; and these sentences were immediately carried into effect. Both the judgment of the Court on the petition for the revival of the decree in the case of *Sharon against Hill*, and the judgment of the Circuit Court, imprisoning Terry and wife for contempt, have been brought to this Court for review; and, in both cases, the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry* (1888), 128 U. S. 289, and *Terry* v. *Sharon* (1889), 131 U. S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the Circuit Court of the United States, during the same term, for their part in these transactions; and the cases were pending in said Court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court-room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death, the denunciations by Terry and his wife of Mr. Justice FIELD were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge FIELD and Judge SAWYER.

Terry, who was present, said nothing to restrain her, but added that he was not through with Judge FIELD yet; and, while in jail at Alameda, Terry said that after he got out of jail, he would horsewhip Judge FIELD, and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge FIELD and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge FIELD would resent it, he said :—

If Judge FIELD resents it, I will kill him.

And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said:—

Yes, I always carry that.

And made a remark about judges and marshals, that they were all a lot of cowardly curs, and he would see some of them in their graves yet. Mrs. Terry also said that she expected to kill Judge FIELD some day. Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers in California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the Court, he said that Justice FIELD had put a lie in the record about him, and when he met FIELD, he would have to take that back. And if he did not take it back, and apologize for having lied about him, he would slap his face or pull his nose.

I said to him, said the witness, Judge Terry, would not that be a dangerous thing to do? Justice FIELD is not a man who would permit anyone to put a deadly insult upon him, like that.

He said, Oh, FIELD won't fight.

I said: Well Judge, I have found nearly all men will fight. Nearly every man will fight when there is occasion for it, and Judge FIELD has had a character in this State of having the courage of his convictions, and being a brave man.

At the conclusion of that branch of the conversation, I said to him: Well, Judge FIELD is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.

He said: Well, that's as good a thing as I want to get.

The whole impression conveyed to me by this conversation was that he felt he had some cause of grievance against Judge FIELD; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight.

Mr. Williams says that after the return of Justice FIELD to California, in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him. It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge FIELD during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice FIELD, as soon as it became known that he was going to attend the Circuit Court in that year.

So much impressed were the friends of Judge FIELD, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney General of the United States, suggesting the propriety of his furnishing some protection to the Judge while in California. This resulted in a correspondence between the Attorney General of the United States, the District Attorney, and the Marshal of the Northern District of California on that subject. This correspondence is here set out:

JOHN C. FRANKS,
United States Marshal,
San Francisco, Cal.

Department of Justice,
WASHINGTON, D. C., April 27th, 1889.

Sir:

The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States Circuit Court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his honor, Justice FIELD, or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of

Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the Court, and the character of its Judge, that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties. You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the District Attorney if deemed best.

Yours truly,

W. H. H. MILLER, *Attorney General.*

United States Marshal's Office, Northern District of California,

HON. W. H. H. MILLER, *Attorney General,* Washington, D. C. SAN FRANCISCO, May 6, 1889.

Sir:

Yours of the 27th ultimo at hand. When the Hon. Judge LORENZO SAWYER, our Circuit Judge, returned from Los Angeles, some time before the celebrated court scene, and informed me of the disgraceful action of Mrs. Terry towards him on the cars while her husband sat in front, smilingly approving it, I resolved to watch the Terrys (and so notified my deputies), whenever they should enter the court-room, to be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their ejectment from the court-room, when I held Judge Terry and his wife as prisoners in my private office, and heard his threats against Justice FIELD, I was more fully determined than ever to throw around the Justice and Judge SAWYER, every safeguard I could. I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the department will reimburse me for any reasonable expenditure. I have always, whenever there is any liklihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice FIELD arrives he, as well as all the federal judges, will be protected from insults, and where an order is made, it will be executed without fear as to consequences. I shall follow your instructions, and act with more than usual caution. I have already consulted with the United States Attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and also assist me in protecting Justice FIELD while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time. The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and, unfortunately, among that class it is necessary to watch.

Your most obedient servant,

J. C. FRANKS,

U. S. Marshal, Northern Dist. of Cal.

HON. W. H. H. MILLER, SAN FRANCISCO, CAL., May 7, 1889.
U. S. Attorney General,
Washington, D. C.

Dear Sir:

Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him upon the subject of using due caution by way of protecting Justice FIELD and the federal judges here in the discharge of their duties in matters in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our Marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the head of our Department was in full sympathy with the efforts being made to protect the judges, and vindicate the dignity of our courts. I write merely to suggest that there is just reason, in the light of the past and the threats made by Judge and Mrs. Terry against Justice FIELD and Judge SAWYER, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that, while due caution has always been taken by the Marshal when either Judge or Mrs Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge SAWYER or Justice FIELD against harm when away from the appraisers' building. Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested; and I verily believe, in view of the direful threats made against Justice FIELD, that he will be in great danger at all times while here. Mr. Franks is a prudent, cool, and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized, in his discretion, to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to the matter, it is important that the deputies whom he may select be not known as such; and, that efficient service may be assured for the purposes indicated, it seems to me that they should be strangers to the Terrys. The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The Marshal, his deputies, and myself suffer daily indignities and insults from Mrs. Terry, in court and out of court, committed in the presence of her husband, and without interference upon his part. I do not propose being deterred from any duty, nor do I purpose being intimidated in the least degree from doing my whole duty in the premises; but I shall feel doubly assured in being able to do so knowing that our Marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties. This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential. I shall write you further upon the subject of these cases in a few days. I have the honor to be your most obedient servant.

JOHN T. CAREY, *U. S. Attorney.*

J. C. FRANKS, Esq.,
U. S. Marshal,
San Francisco, Cal.

Department of Justice,
WASHINGTON, D. C., May 27, 1889.

Sir:

Referring to former correspondence of the Department, relating to a possible disorder in the session of the approaching term of court, owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court, as a separate account from your other accounts against the government, for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this Department in order to secure executive action and approval.

Very respectfully,
W. H. H. MILLER, *Attorney General.*

The result of this correspondence was that Marshal Franks appointed Mr. Neagle a Deputy-Marshal for the Northern District of California, and gave him special instructions to attend upon Judge FIELD, both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge FIELD went from San Francisco to Los Angeles, to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that Court, and returned with him to San Francisco. It appears from the uncontradicted evidence in the case that, while the sleeping-car in which were Justice FIELD and Mr. Neagle stopped a moment, in the early morning, at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace-officers could be found at Lathrop, where the train stopped for breakfast; and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace-officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge FIELD. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge FIELD of the presence of Terry on the train, and advised him to remain, and take his break-

fast in the car. This the Judge refused to do, and he and Neagle got out of the car, and went into the dining-room, and took seats beside each other in the place assigned them by the person in charge of the breakfast-room; and very shortly after this Terry and wife came into the room, and Mrs. Terry, recognizing Judge FIELD, turned and left in great haste, while Terry passed beyond where Judge FIELD and Neagle were, and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and, passing around the table in such a way as brought him behind Judge FIELD, who did not see him or notice him, came up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out:

Stop! Stop! I am an officer!

Upon this, Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down, and died in a few minutes. Mrs. Terry entered the room, with the satchel in her hand, just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon FIELD and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that FIELD and Neagle had murdered her husband intentionally; and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice.

The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the circuit court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice FIELD; and we are quite sure that if Neagle had been merely a brother or a friend of Judge FIELD, traveling with him, and aware of all the previous relations of Terry to the Judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice FIELD'S life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California; and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offense, unless there be found in aid of the defense of the prisoner, some element of power and authority asserted under the government of the United States. This element is said to be found in the facts that Mr. Justice FIELD, when attacked, was in the immediate discharge of his duty as Judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as Circuit Justice in the case, for which they were committed for contempt of court; and that the Deputy-Marshal of the United States who killed Terry in defense of FIELD'S life, was charged with a duty, under the law of the United States, to protect FIELD from the violence which Terry was inflicting, and which was intended to lead to FIELD'S death. To the

inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice FIELD was a member of the Supreme Court of the United States, and had been a member of that Court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that Court. The business of the Supreme Court has become so exacting that, for many years past, the Justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months. But the Justices of this Court have imposed upon them other duties, the most important of which arise out of the fact that they are also Judges of the Circuit Courts of the United States. Of these circuits there are nine, to each one of which a Justice of the Supreme Court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows—

> The Chief Justice and Associate Justices of the Supreme Court shall be allotted among the circuits by an order of the Court; and a new allotment shall be made whenever it becomes necessary or convenient, by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or Associate Justice, or otherwise."

Section 610 declares that it "shall be the duty of the Chief Justice and of each Justice of the Supreme Court to attend at least one term of the Circuit Court in each district of the circuit to which he is allotted during every period of two years." Although this enactment does not require, in terms, that the Justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the Circuit Justice to reach them all in one year; and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit, every year. The Justices of the Supreme Court have been members of

the Circuit Courts of the United States ever since the organization of the government; and their attendance on the circuit, and appearance at the places where the courts are held, has always been thought to be a matter of importance.

In order to enable him to perform this duty, Mr. Justice FIELD had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this, he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be; and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court. So it is impossible for a Justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the Circuit Courts, as prescribed by section 610, without traveling, in the usual and most convenient modes of doing it, to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words—

> The Justices of the Supreme Court shall go from Washington City to the place where their terms are held every year.

Justice FIELD had not only left Washington, and traveled the three thousand miles or more which was necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time,

and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject. In the case of *U. S.* v. *The Little Charles* (1819), 1 Brock. 380, a question arose before Chief Justice MARSHALL, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the District Judge at his chambers, and not in court. The Act of Congress authorized stated terms of the District Court, and gave the judge power to hold special courts, at his discretion, either at the place appointed by the law, or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;" and cites the practice of the courts in support of that view of the subject. In the case of *U. S.* v. *Gleason* (1867), U. S. C. Ct., D. Iowa, 1 Woolw. 128, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed; and the Court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named.

"It is claimed by the counsel for the defendant," says the report, "that

if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the intention of making the arrests at that time, and were returning to headquarters at Grinnell with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But the Court held that this was not a sound construction of the statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the further prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still employed in arresting deserters, within the meaning of the statute. It is not necessary," said the Court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment."

We have no doubt that Mr. Justice FIELD, when attacked by Terry, was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection, under those circumstances, which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge FIELD in the present case, and, indeed, no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must, in this connection, show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy-marshals of the United States, in express terms, to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view

of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty; and we are satisfied that, if it was the duty of Neagle, under the circumstances,—a duty which could only arise under the laws of the United States,—to defend Mr. Justice FIELD from a murderous attack upon him, he brings himself within the meaning of the section we have recited.

This view of the subject is confirmed by the alternative provision that he must be in custody "for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or a judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States." In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a "law," within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means than by the skill which is applied to the cure of disease after it has become fully developed. So, also, the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed. If a person in the situation of Judge

FIELD could have no other guaranty of his personal safety while engaged in the conscientious discharge of a disagreeable duty than the fact that, if he was murdered, his murderer would be subject to the laws of a State, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind, of insulting him and assaulting him, and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the Government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the Government so defenseless and unprotected.

The views expressed by this Court through Mr. Justice BRADLEY, in *Ex parte Siebold* (1880), 100 U. S. 371, 394, are very pertinent to this subject, and express our views with great force. That was a case of a writ of *habeas corpus*, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland for an offense committed against the election laws during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted and sentenced to fine and imprisonment, and filed his petition in this Court for a writ of *habeas corpus*, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and State courts on this subject, it is said :—

> Somewhat akin to the argument which has been considered, is the objection that the deputy-marshals authorized by the act of Congress to be created, and to attend the elections, are authorized to keep the peace, and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confined to the government of the United States, but belongs exclusively to the States. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire

misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land." * * * Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the process of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation. * * * It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.

At the same term of the court, in the case of *Tennessee* v. *Davis* (1880), 100 U. S. 257, 262, where the same questions in regard to the relative powers of the federal and State courts were concerned, in regard to criminal offenses, the Court expressed its views through Mr. Justice STRONG, quoting from the case of *Martin* v. *Hunter* (1816), 1 Wheat. (14 U. S.) 363, the following language:—

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and then proceeding: "It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State,

yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government; and even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it.

To cite all the cases in which this principle of the supremacy of the government of the United States in the exercise of all the powers conferred upon it by the Constitution is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the Court, having a direct reference to the nature of the case before us. Where, then, are we to look for the protection which we have shown Judge FIELD was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this Court, in the division of the powers of government between the three great departments, executive, legislative, and judicial, the judicial is the weakest for the purposes of self-protection, and for the enforcement of the powers which it exercises. The ministerial officers, through whom its commands must be executed, are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure.

They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the District attorneys of the United States who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress. If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, § 3, art. 2, declares that the President "shall take care that the laws be faithfully executed;" and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them, and to fill vacancies. He is declared to be the Commander in chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, who are familiarly called "cabinet ministers." These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called; and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed." Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms; or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair, and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention; and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the postmaster general is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed, and the mail carriers assaulted and murdered, in any particular region of country, who can doubt the authority of the President, or of one of the executive departments under him, to make an order for the protection of the mail, and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice FIELD, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United

States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more, which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as "timber thieves," who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately, we find this question answered by this court in the case of *Wells* v. *Nickles* (1882), 104 U. S. 444.

That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States, and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government, thus to seize the timber cut by trespassers on its lands. The Court said:

> The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.

But the Court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land-office had, by instructions from the Sec-

retary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the Court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *U. S.* v. *Tin Co.* (1888), 125 U. S. 273. In that case, a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General, or any other officer of the government, to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit, or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this Court. The response of this Court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was no such express authority; and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said:

> If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief, by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argu-

ment. * * * There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument thus fraudulently obtained without a special act of Congress in each case, or without some special authority applicable to this class of cases?

The same question was raised in the earlier case of *U. S.* v. *Hughes* (1850), 11 How. (52 U. S.) 552, and decided the same way.

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death; and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence, already recited in this opinion, between the Marshal of the Northern District of California and the Attorney General and the District Attorney of the United States for that District, although prescribing no very specific mode of affording this protection by the Attorney General, is sufficient, we think, to warrant the Marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defense of Mr. Justice FIELD.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter 14, title 13, of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

The marshals and their deputies shall have, in each State, the same

powers in executing the laws of the United States as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

If, therefore, a sheriff of the State of California, was authorized to do in regard to the laws of California what Neagle did—that is, if he was authorized to keep the peace, to protect a judge from assault and murder—then Neagle was authorized to do the same thing in reference to the laws of the United States. Section 4176 of the Political Code of California reads as follows:

The sheriff must (1) preserve the peace; (2) arrest and take before the nearest magistrate, for examination, all persons who attempt to commit, or have committed, a public offense; (3) prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge.

And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person," or "when committed in defense of habitation, property, or person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony." That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties, violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California—are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge FIELD, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing his duty, it became necessary, for the protection of Judge FIELD or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed—the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power—there can be no question of the authority of the sheriff to

have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty —a duty which he had no liberty to refuse to perform—to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But, all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus* that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California, and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offense charged against the prisoner consists in an act done in pursuance of a law of the United States, and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its fourteenth section, authorized the judges and the courts of

the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment: 1 Stat. at Large 81. This did not present the question, or at least it gave rise to no question which came before the courts, as to releasing by this writ, parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the State authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833 (4 Stat. at Large 634), among other remedies for such condition of affairs, provided by its seventh section, that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *corpus habeas* might issue by the federal judges arose out of the celebrated McLeod Case, in which McLeod, charged with murder, in a State court of New York, had pleaded that he was a British subject, and that what he had done, was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York, the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New

York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus* by the act of August 29, 1842 (5 Stat. at Large 539), entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law on this subject, Senator Berrien, who introduced it into the Senate, observed:

> The object was to allow a foreigner prosecuted in one of the States of the Union for an offense committed in that State, but which, he pleads, has been committed under authority of his own sovereignty or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations; and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison, awaiting the proceedings of the State jurisdiction in the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief.

No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867 (14 Stat. at Large 385); and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and, if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

It would seem as if the argument might close here. If

the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of *habeas corpus* one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case. We have already cited such decisions of this Court as are most important and directly in point, and there is a series of cases decided by the circuit and district courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases, they made application to the judges of the United States for relief by the writ of *habeas corpus*, which gave rise to several very interesting decisions on this subject. In *Ex parte Jenkins* (1853), U. S. C. Ct., E. D. Pa., 2 Wall. Jr. 521, 529, the Marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a Justice of the Peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of *habeas corpus*, which was heard before Mr. Justice GRIER, who held that under the act of 1833, already referred to, the Marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said :

> The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If, under such a writ, they may not discharge their officer when imprisoned "by any

authority" for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. * * * It was passed when a certain State of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such State legislation.

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge KANE on another writ of *habeas corpus*, and again released: Id. 531. A third time the Marshal, being indicted, was arrested on a bench warrant, issued by the State court, and again brought before the Circuit Court of the United States by a writ of *habeas corpus*, and discharged. Some remarks of Judge KANE on this occasion are very pertinent to the objections raised in the present case. He said: Id. 543.

It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them [in the State court], will, in effect, prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this Court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either State or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis* while the case is at bar. It is made ineffectual at any time by the discharge on *habeas corpus*. * * * And there is no harm in this. No one imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individnals, still less of retaliating them.

Many other decisions by the circuit and district courts to the same purport are to be found, among them the following: *Ex parte Robinson* (1855), U. S. C. Ct., D. Ohio, 6 McLean 355; *U. S.* v. *Jailer of Fayette Co.* (1867), U. S. C. Ct., D. Ky., 2 Abb. 265; *Ramsey* v. *Jailer of Warren Co.* (1879), U. S. D. Ct., D. Ky., 2 Flip. 451; *In re Neill* (1871), U. S. C. Ct., S. D. N. Y., 8 Blatchf. 156; *Ex parte Bridges* (1875), U. S. C. Ct., N. D. Ga., 2 Woods, 428; *Ex parte Royall* (1886), 117 U. S. 241. Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said:—

If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the State court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either way they do not administer the criminal law of a State. In the one case as much as in the other, and no more, do they interfere with State judicial power.

The same answer is given in the present case. To the objection, made in argument, that the prisoner is discharged by this writ from the power of the State court to try him for the whole offense, the reply is that if the prisoner is held in the State court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as Marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the State court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury; and, if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our

duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require. The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice FIELD while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that, without prompt action on his part, the assault of Terry upon the Judge would have ended in the death of the latter; that, such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the Sheriff of San Joaquin county.

FIELD, J., did not sit at the hearing of this case, and took no part in its decision.

LAMAR, J., (*dissenting*). The Chief Justice and myself are unable to assent to the conclusion reached by the majority of the Court. Our dissent is not based on any conviction as to the guilt or innocence of the appellee. The view which we take renders that question immaterial to the inquiry presented by this appeal. That inquiry is, whether the appellee, Neagle, shall in this *ex parte* proceeding be discharged and delivered from any trial or further inquiry in any court, State or federal, for what he has been accused of in the forms prescribed by the Constitution and laws of the State in which the act in question was committed. Upon

that issue, we hold to the principle announced by this court in the case of *Ex parte Crouch* (1884), 112 U. S. 178, 180, in which Mr. Chief Justice WAITE, delivering the opinion of the Court, said :—

> It is elementary learning that, if a prisoner is in the custody of a State court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a court of the United States simply because he is not guilty of the offense for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defense to the information under which he is held. Whether his defense is sufficient or not is for the court which tries him to determine. If, in this determination, errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our reports are numerous: *Ex parte Watkins* (1830), 3 Pet. (28 U. S.) 202; *Ex parte Lange* (1873), 18 Wall. (85 U. S.) 163, 166; *Ex parte Parks* (1876), 93 U. S. 18, 23; *Ex parte Siebold* (1879), 100 Id. 371, 374; *Ex parte Virginia* (1879), Id. 339, 343; *Ex parte Rowland* (1881), 104 Id. 604, 612; *Ex parte Curtis* (1882), 106 Id. 371, 375; *Ex parte Yarbrough* (1884), 110 Id. 651, 653.

Many of the propositions advanced in behalf of the appellee, and urged with impressive force, we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the office and function of the writ of *habeas corpus*, its operation under and by virtue of Section 753 of the Revised Statutes, or the propriety of its use in the manner and for the purposes for which it has been used in any case where the prisoner is under arrest by a State for an act done "in pursuance of a law of the United States." Nor do we contend that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the federal law for the trial and conviction of the accused. Nor do we question the general propositions that the federal government established by the Constitution is absolutely sovereign over every foot of soil and over every person within the national territory, within the sphere of action assigned to it; and that within

that sphere its Constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability whatever. Nor, again, do we dispute the proposition that whatever is necessarily implied in the Constitution and laws of the United States is as much a part of them as if it were actually expressed. All these questions we pretermit. The recognition by this Court, including ourselves, of their soundness, does not in the least elucidate the case; for they lie outside of the true controversy.

The ground on which we dissent, and which in and by itself seems to be fatal to the case of the appellee, is this: that, in treating Section 753 of the Revised Statutes as an act of authority for this particular use of the writ, a wholly inadmissible construction is placed on the word "law," as used in that statute, and a wholly inadmissible application is made of the clause "in custody in violation of the Constitution * * * of the United States." It will not be necessary to consider these two propositions separately, for they are called into this case as practically one. The section referred to is as follows:

> The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States, etc.

It is not contended in behalf of the appellee that the writ of *habeas corpus* could be used, as here it is, in any case, without authority of a statute. In *Ex Parte Bollman* (1807), 4 Cranch (8 U. S.) 75, 94, Chief Justice MARSHALL said:

> The power to award the writ [of *habeas corpus*] by any of the courts of the United States must be given by written law.

It is not contended that there is any statute other than those now found in the Revised Statutes of the United States. Nor is it contended that in those statutes there is

any authority for the use here made of the writ other than what is embraced in the clauses above quoted. The issue, as stated above, is thus narrowed to the proper force to be attributed to those clauses.

It is stated as the vital position in appellee's case, that it is not supposed that any special act of Congress exists which authorizes the marshals or deputy-marshals of the United States, in express terms, to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons; that, in the view taken of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law," within the meaning of this phrase; and that it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there was to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments might operate unfavorably. In considering this position, it is indispensable to observe carefully the distinction between the individual man, Neagle, and the same person in his official capacity as a deputy-marshal of the United States, and also the individual man whose life he defended, and the same person in his official capacity of a Circuit Justice of the United States. The practical importance of the distinction between the rights and liabilities of a person in his private character and the authority and immunity of the same person in his official capacity is clearly pointed out and illustrated in *U. S.* v. *Kirby* (1868), 7 Wall. (74 U. S.) 482, 486, in which the court says:

> No officer or employe of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws. [And the court adds:] Indeed, it may be doubted whether

it is competent for Congress to exempt the employes of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But, whether legislation of that character be Constitutional or not, no intention to extend such exemption should be attributed to Congress, unless clearly manifested by its language.

Now, we agree, taking the facts of the case as they are shown by the record, that the personal protection of Mr. Justice FIELD as a private citizen, even to the death of Terry, was not only the right, but was also the duty, of Neagle, and of any other by-stander; and we maintain that for the exercise of that right or duty he is answerable to the courts of the State of California, and to them alone. But we deny that, upon the facts of this record, he, as Deputy-Marshal Neagle, or as Private Citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge FIELD as a Circuit Justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever, in fact, of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and, therefore, we think that the courts of the United States have, in the present state of our legislation, no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the Sheriff.

The contention of the appellee, however, is, that it was his official duty, as United States Marshal, to protect the Justice; and that for so doing, in discharge of this duty, "which could only arise under the laws of the United States," his detention by the State courts brings the case within section 753 of the Revised Statutes, as aforesaid. We shall therefore address ourselves, as briefly as is consistent with the gravity of the question involved, to a consideration of the

justice of that claim. We must, however, call attention again to the formal and deliberate admission that it is not pretended that there is any single, specific statute making it, in so many words, Neagle's duty to protect the Justice. The position assumed is, and is wholly, that the authority and duty to protect the Justice did arise directly and necessarily out of the Constitution and positive Congressional enactments.

The Attorney General of the United States has appeared in this case for the appellee, in behalf of the government; and, in order that the grounds upon which the government relies in support of its claim against the State of California, that Neagle should be discharged on this writ, may fully appear, it is proper to give some of his most important propositions in his own language. He maintains that—

> It was the duty of the judiciary, having been thus protected by the executive department, to sit in judgment upon and to vindicate the officer of the executive department, if innocent, in the discharge of his duty, because such authority in the federal judiciary is essential, in principle, to the existence of the nation.
>
> We insist that, by the Constitution of the United States, a government was created, possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great Constitutional Departments; and that each of these Departments is by that Constitution invested with all of those governmental powers naturally belonging to such Department which have not been expressly withheld by the terms of the Constitution.
>
> In other words, that Congress is invested not only with expressed, but with implied, legislative powers; that the judiciary is invested not only with express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it; and that the President, in like manner, by the very fact that he is made the Chief Executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge; that many of these powers, pertaining to each branch of the government, are self-executing, and in no way dependent, except as to the ways and means, upon legislation.
>
> The Constitution provides that before the President enters upon the execution of his office he shall take an oath: 'I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States' [And he asks:] Has this clause no signifi-

cance? Does it not, by necessary implication, invest the President with self-executing powers—that is, powers independent of statute?

In reply to these propositions, we have this to say: We recognize that the powers of the government, "within its sphere," as defined by the Constitution and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme; that these supreme powers extend to the protection of itself and all of its agencies, as well as to the preservation and the perpetuation of its usefulness; and that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications. But, while that is all true, it is also true that the powers must be exercised not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself. These great federal powers, whose existence in all their plenitude and energy is incontestable, are not autocratic and lawless. They are organized powers committed by the people to the hands of their servants for their own government, and distributed among the legislative, executive, and judicial departments. They are not *extra* the Constitution; for, in and by that Constitution, and in and by it alone, the United States, as a great, democratic, federal republic, was called into existence, and finds its continued existence possible. In that instrument is found not only the answer to the general line of argument pursued in this case, but also to the specific question propounded by the Attorney General in respect to the President's oath, and its implications.

The President is sworn to "preserve, protect, and defend the Constitution." That oath has great significance. The sections which follow that prescribing the oath (Sections 2 and 3 of Article 2) prescribe the duties and fix the powers of the President. But one very prominent feature of the Constitution which he is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of section 8, art. 1, in which it is declared that—

> The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world, and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument. And that clause alone conclusively refutes the assertion of the Attorney General that it was "the duty of the Executive Department of the United States to guard and protect at any hazard the life of Mr. Justice FIELD in the discharge of his duty, because such protection is essential to the existence of the government." Waiving the question of the essentiality of any such protection to the existence of the government, the manifest answer is that the protection needed and to be given must proceed not from the President, but primarily from Congress.

Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to make laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. In fact, for the President to have undertaken to make any law of the United States pertinent to this matter would have been to invade the domain of power expressly committed by the Constitution exclusively to Congress. That body was perfectly able to pass such laws as it should deem expedient in reference to such matter. Indeed, it has passed such laws in reference to elections, expressly directing the United States Marshals to attend places of election, to act as peace-officers, to arrest with and without process, and to protect the supervisors of election in the

discharge of their duties; and there was not the slightest legal necessity out of which to imply any such power in the President. For these reasons, the letters of the Attorney General to Marshal Franks, granting that they did import what is claimed, and granting that the Attorney General was to all intents and purposes, *pro hac vice*, the President, invested Neagle with no special powers whatever. They were, if so construed, without authority of law; and Neagle was then and there a simple Deputy-Marshal—no more and no less.

To illustrate the large sphere of powers self-executing and independent of statutes claimed to be vested in the Executive, reference is made to the continually recurring cases of the President's interference for the protection of our foreign born and naturalized citizens on a visit to their native country; and we are cited, as a striking instance of the exercise of such power, to the case of Martin Kozsta, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen, and who, while at Smyrna, was seized by order of an Austrian official and confined on board an Austrian vessel, and who, being afterwards delivered up to Captain Ingraham, commanding an American war vessel, in compliance with a demand backed by a demonstration of force on the part of that officer, was placed in the hands of a French consul subject to negotiations between the American and Austrian governments, resulting in the famous correspondence between the American Secretary of State, Mr. Marcy, and the Chevalier Hulsemann, representing the Austrian government, and the restoration of Kozsta to freedom. We are asked; upon what express statute of Congress then existing can this act of the government be justified? We answer, that such action of the government was justified because it pertained to the foreign relations of the United States, in respect to which the federal government is the exclusive representative and embodiment of the entire sovereignty of the nation, in its united character; for to foreign nations, and in our intercourse with them, States and State

governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit. That authority the Constitution vests expressly and conclusively in the treaty-making power, the President and Senate, by one simple and comprehensive grant.

> He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.

This broad grant makes enumeration of particular powers unnecessary. All other delegations of powers in reference to the international relations of this country are carefully and specifically enumerated and assigned, one by one, to their designated departments. In reply, therefore, to the question, what law expressly justifies such action? we answer, the organic law, the Constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power.

Other cases are referred to in illustration of the same point; but the one which it is alleged presents that principle in the most imposing form is that of *U. S.* v. *Tin Co.* (1888), 125 U. S. 273. In that case a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of land, on the ground that it had been obtained from the government by fraud and deceit practiced upon its officers. There are, it is true, some expressions in the opinion delivered in that case which seem to admit that there is no specific act of Congress expressly authorizing the Attorney General to bring suit for the annulment of a patent procured by fraud from the government; but a close examination of the doctrine of the Court shows that it goes no further than the assertion that the authority of the Attorney General arises, by implication, directly and immediately, out of the express law of Congress. The opinion quotes the clause of the Constitution which declares that the judicial power shall

extend to all cases to which the United States shall be a party, and says that this means, mainly, where it is a party plaintiff. It then refers to the statute of Congress which expressly directs the United States district attorneys to bring suits in behalf of the government, and that the suits thus brought by them are to be under the immediate superintendence and control of the Attorney General. The utmost extent to which the court goes is that, while admitting there is no express authority in the Attorney General to institute the suit, yet such authority is directly and necessarily involved in the express provisions of the statute vesting him with the entire control and superintendence of such suits, and the provision and control of the district attorneys in their conduct of them.

Equally conclusive is the answer which the Constitution makes to the assertion that by the Constitution the judiciary is invested not only with the express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it. It may be found in the clause which declares that "the Congress shall have power * * * to constitute tribunals inferior to the Supreme Court," and in that which declares it shall make all laws necessary and proper for carrying into execution the powers of those tribunals. The correlation between those clauses is manifest and unmistakable. If Congress can and must, by the very terms of the Constitution, make all laws proper for carrying into execution all the powers of any department of the government, and if it can create the circuit court, expand its powers, abridge them, and abolish the court, at will, how can it be that that court, at the least, shall have any implied powers derived from the Constitution and independent of the statutes? And yet in this transaction it must be remembered that Mr. Justice FIELD is only claimed to be the representative of that court.

Not only do the foregoing views seem to us to be the logical and unavoidable results of original and independent studies of the Constitution, but they are also sustained and

enforced by a long series of judicial recognitions and assertions. In *U. S.* v. *Fisher* (1804), 2 Cranch (6 U. S.) 358, 396, Chief Justice MARSHALL, in delivering the opinion of the court, said of the clause above relied on:

> In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.

In *McCulloch* v. *Maryland* (1819), 4 Wheat. (17 U. S.) 316, 420, 421, Chief Justice MARSHALL, for the court, delivered one of those opinions which are among the chief ornaments of American jurisprudence. It is largely devoted to an exhaustive analysis of the Constitutional clause in question. Among other things, he says:

> The result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

In *U. S.* v. *Reese* (1876), 92 U. S. 214, 217, Chief Justice WAITE, delivering the opinion of the Court, said:

> Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

In *Strauder* v. *West Virginia* (1880), 100 U. S. 303, 310, the Court say:

A right or an immunity, whether created by the Constitution or only guarantied by it, even without any express delegation of power, may be protected by Congress.

Cooley, in his work on Constitutional Limitations, *19, collates from the numerous adjudications of this Court, cited by him, the following principles:

So far as that instrument [the Constitution] apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates; but an act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name; and, although the courts of the United States administer the common law in many cases, they do not derive authority from the common law to take cognizance of and punish offenses against the government. Offenses against the nation are defined, and their punishment prescribed, by acts of Congress.

In a note to this paragraph he says:

Demurrer to an indictment for libel upon the President and Congress. By the Court: "The only question which this case presents is whether the circuit courts can exercise a common-law jurisdiction in criminal cases. * * * The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States. Whatever is not expressly given to the former, the latter expressly reserve. * * * It is not necessary to inquire whether the general government, in any and to what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present. It is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation:" *U. S.* v. *Hudson* (1812), 7 Cranch. (11 U. S.) 32. See *U. S.* v. *Coolidge* (1816), 1 Wheat. (14 U. S.) 415. "It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption:" Per McLEAN, J., *Wheaton* v. *Peters* (1834), 8 Pet. (33 U. S.) 658; and citing many other authorities.

In *Tennessee* v. *Davis* (1880), 100 U. S. 257, 267, referring to the judiciary act of 1789, the Court said:

> It [the Constitution] did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, etc.

It would seem plain, therefore, that if the Constitution means anything, and if these judicial utterances, extending, as they do, over a period of eighty years, and embracing a variety of interests, mean anything, they mean that the power to provide and prescribe the laws necessary to effectuate the governmental and official powers of the United States and its officers is vested in Congress.

The *gravamen* of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority, must show the authority. If he claims the authority of law, then what law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So, in almost these words, it is claimed in this case. Is it a law because of some Constitutional investiture of sovereignty in the persons of judges, who carry that sovereignty with them wherever they may go? Because of some power inherent in the judiciary to create for others a rule or law of conduct outside of legislation, which shall extend to the death penalty? So, also, in this case, *in totidem verbis*, it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress, else it cannot exist. If it be said that Congress has the power to make such laws, yet, in the absence of statutes from that source, other departments may act in the premises; or if it be said that the possession of that power by the government does not negative the existence of similar powers in other departments of the government—the response that these powers are plainly not concurrent, but are exclusive, can be

made in the language of Mr. Justice STORY, in *Prigg* v. *Pennsylvania* (1842), 16 Pet. (41 U. S.) 539, 617. Speaking of the fugitive slave law of 1793, he says:

> If Congress have a Constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, * * * in such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.

If it be said that that case had reference to the interference of a State with Congressional powers, while in the case at bar no such question is involved, the answer is that the difference is favorable, and not adverse, to the theory of this opinion. The principle is the same; and, if that principle can be applied, as applied it was, to the denial to a State legislature of the powers previously enjoyed over matters originally appertaining to it, *a multo fortiori* will it apply to the exclusion of two co-ordinate departments of the same government from powers which they never possessed.

As before stated, if the killing of Terry was done "in pursuance of a law of the United States," that law had somewhere an origin. There are, under the general government, only two possible sources of law. The common law never existed in our federal system. The legislative power possessed by the United States must be found either exercised in the Constitution as fundamental law, or by some body or person to whom it was delegated by the Constitution. It has already been pointed out that the Constitution does not itself create any such law as that contended for, and that it could not have been created by any executive or judicial action or *status* is made manifest, not only by the clause in Section 8, Art. 1, already cited and commented on, but also by Section 1, Art. 1, and the two paragraphs of Article 6. Section 1, Art. 1, provides that—

> All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The second paragraph of Article 6 provides that—

> The laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

Now, what is it that constitutes the supreme laws of which so much is said in this case? How distinctly, how plainly, and how fully the Constitution answers. The Constitution itself, the treaties, and the laws made in pursuance of the Constitution. Made by whom? By Congress, manifestly. The two clauses already quoted give the power of legislation in the most sweeping terms. It alone has power to make any law. Anything purporting to be a law not enacted by Congress would not be "in pursuance of" any provision of the Constitution. Thus we are driven to look for the source of this asserted law to some legislation of Congress, legislation made under either its express Constitutional authority, or under its properly implied authority—it is immaterial which; and there is none of either class. The authority is sought to be traced here through the self-preservative power of the federal judiciary implied from the Constitution, and then through the obligation of the Executive to protect the judges, implied from the Constitution, whereas there is no such implication in either case, for the simple but all-sufficient reason that by the Constitution itself, the whole of those functions is committed to Congress.

Since then, the Constitution did not, by its own direct provisions, regulate this matter, but committed it to the hands of Congress, with full powers in the premises, it is only by the enactment of some law of Congress that the appellee can show that he is in custody "in violation of the Constitution."

As previously remarked, the two propositions are, as to this case, essentially one. Turning again to the statute under which the writ is sued out, we find that the clause relied on is that which makes the writ applicable where the person "is in custody for an act done or omitted in pursuance of a law of the United States." The question then

arises, what sort of law? What does the expression import? Is it not plain that it means just what the same expression all through the Constitution imports? If that instrument, which is the fountain of the federal power, be consulted, it will be found that in it, and the amendments thereto, the word "law," in either its singular form or its plural, "laws," is used forty-two times. Of these instances of that use, sixteen are where the word is used in reference to the jurisprudence of the States and of the law of nations, or where they are merely terms of description, such as "courts of law," "cases in law and equity," etc. Of the other instances of its use, and which all have reference to that body of rules which constitute the jurisprudence distinctly of the United States, there are only three cases in which it is not manifest that the word is used as equivalent to "statutes," "enactments of the Congress;" and it is clear, in those three instances, the word is used, also, as equivalent to "statutes." The following are examples:

The Congress may at any time, by law, make or alter such regulations [in regard to the election of Senators and Representatives]. Article 1, § 4.

Every bill * * * shall, before it become a law, be presented, etc. Article 1, § 7.

Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies, etc. Article 1, § 8.

Congress shall have power * * * to make all laws which shall be necessary and proper, etc. Article 1, § 8.

No bill of attainder or *ex post facto* law shall be passed. Article 1, § 9.

Congress shall make no law respecting an establishment of religion. First Amendment.

It would be tedious, and it is unnecessary, to set them all forth. They all have the same manifest meaning of "statutes," except three, and in those three instances, the words do not mean anything other than statutes. We think it plain that the expression, "a law of the United States," as used in Section 753 of the Revised Statutes, means just what the similar expression means all through the Constitution, and that is, "a statute of the United States:" *Tennessee* v. *Davis* (1880), 100 U. S. 264.

Of the decisions of this Court, cited as authority to sustain the order discharging the appellee, *Ex parte Siebold* (1880), 100 U. S. 371, and *Tennessee* v. *Davis*, *supra*, are relied on as having the most direct bearing on the case. We do not consider *Ex parte Siebold* as being adverse to the proposition which we maintain. In that case, the existence of express statutes upon which the controversy arose was undisputed. The sole question was as to the Constitutional competency of Congress to pass certain laws which, in the most express, explicit, and imperative words, required marshals and deputy-marshals of the United States to attend places for the election of members of Congress, to keep the peace at the polls, make arrests, and protect the supervising officers in the discharge of their duties at those elections. The Court decided that the enactments of Congress in question were Constitutional. The power of Congress to pass these laws being thus settled, no assertion as to the powers of the marshals and deputy-marshals to execute them in the States can be found in that able opinion which do not follow as a logical consequence. We fail to see anywhere in the decision any intimation that, independently of such legislation, the officers therein named could, by virtue of their office, have exercised the same powers in obedience to the instructions of an executive department, in the exercise of its authority implied from the Constitution. In *Tennessee* v. *Davis*, the case was removed from a State court to the circuit court of the United States under the express provisions of Section 643 of the Revised Statutes. The homicide for which the petitioner was prosecuted, was committed by him while executing his duties as a revenue officer, in pursuance of the express requirements of the revenue laws, and in defense of his own life, upon a party offering unlawful resistance. So far from running counter to the position we are seeking to maintain, we think the principle there laid down on the point we are now discussing is in accord with that position. The language of the court, through Mr. Justice STRONG, who delivered its opinion, is as follows:—

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted: 2 Story, Const. § 1647; *Cohens* v. *Virginia* (1821), 6 Wheat. (19 U. S.) 379.

While it is true that the opinions in both of those cases assert in the strongest and most impressive language the supremacy of the government of the United States in the exercise of the powers conferred upon it by the Constitution, we regard them, also, as a vindication of Congress as the law-making department of the government, as the depository of the implied and constructive powers of the government, or, as Mr. Chief Justice MARSHALL expresses it, of the power "to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble." As the *Siebold Case* and *Tennessee* v. *Davis* have been referred to as the most important and directly in point in support of the opposite view, we do not deem it necessary to give an extended examination of the series of cases decided by the circuit and district courts cited to the same purport. *Ex parte Jenkins* (1853), U. S. C. Ct., E. D. Pa., 2 Wall. Jr. 521, to which attention is more especially called, combined in itself the main features of most of the others, which were proceedings under the fugitive slave law, in which United States marshals were arrested while executing process under that law by State officers acting under the authority of the statutes of the State, the inevitable effect, if not the avowed object, of which were to nullify the operation of the aforesaid act of Congress. This was so in *Ex parte Jenkins*. The United States Marshal was arrested on a warrant issued by a State magistrate while he was executing a warrant issued under said law of Congress. He was brought before the Circuit Court of the United States for the Eastern District of Pennsylvania, on a writ of *habeas corpus*, and was discharged upon the ground that the fugitive slave law, having been enacted in pursuance of the Constitution of the United States, was paramount to the law of Pennsylvania in conflict with it,

and that the Marshal, being in custody for an act done in pursuance of that law of Congress, and in execution of process under it, was entitled to his discharge. It is so manifest that that case was within the provision of Section 753 of the Revised Statutes, that further comment is unnecessary, and the same may be said of all of the other decisions of the circuit and district courts. In every one of them the party discharged was in custody either for an act done in pursuance of an express statute of Congress, or in the execution of a decree, order, or process of a court, or the custody was in violation of the Constitution of the United States.

We stated at the outset of these remarks that we raised no question upon the discussion of the history of the legislation of Congress upon the subject of the writ of *habeas corpus*. We think, however, it is pertinent, in this connection, to inquire what was the necessity for any such legislation at all, if the theory contended for as to the sufficiency of the self-executing powers of the executive and judicial departments of the government to protect all the agencies and instrumentalities of the federal government is correct. Why could not President Jackson, in 1833, as the head of the executive department, invested with the power, and charged with the duty, to take care that the laws be faithfully executed, and to defend the Constitution, have enforced the collection of the federal revenues in the port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of State authority, without the aid of the act of 1833? Why, in 1842, when the third *habeas corpus* act was passed, could not the President of the United States, by virtue of the same self-executing powers of the Executive, together with those of the judicial department, have enforced the international obligations of the government without any such act of Congress? It is a noteworthy fact in our history that whenever the exigencies of the country, from time to time, have required the exercise of executive and judicial power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was

found, in every instance, necessary to invoke the interposition of the power of the national legislature. As early as 1807, in *Ex parte Bollman* (1807), 4 Cranch. (8 U. S.) 75, 94, Chief Justice MARSHALL said:—

> The power to award the writ [of *habeas corpus*] by any of the courts of the United States must be given by written law. * * * The inquiry, therefore, on this motion, will be whether, by any statute compatible with the Constitution of the United States, the power to award a writ of *habeas corpus* in such case as that of Erick Bollman and Samuel Swartwout has been given to this court.

It is claimed that such a law is found in Section 787 of the Revised Statutes, which is as follows:—

> It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.

It is contended that the duty imposed upon the marshal of each district by this section is not satisfied by a mere formal attendance upon the judges while on the bench; but that it extends to the whole term of the courts while in session, and can fairly be construed as requiring him to attend the judge while on his way from one court to another, to perform his duty. It is manifest that the statute will bear no such construction. In the first place, the judge is not the court. The person does not embody the tribunal, nor does the tribunal follow him in his journeys. In the second place, the direction that he shall attend the court confers no authority or power on him of any character. It is merely a requirement that he shall be present, in person, at the court when sitting, in order to receive the lawful commands of the tribunal, and to discharge the duties elsewhere imposed upon him. Great as the crime of Terry was in his assault upon Mr. Justice FIELD, so far from its being a crime against the court, it was not even a contempt of court, and could not have received adequate punishment as such. Section 725 of the Revised Statutes limits contempt to cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

It is claimed that the law needed for appellee's case can be found in Section 788 of the Revised Statutes. That section is as follows:—

> The marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

It is then argued that, by the Code of California, the sheriff has extensive powers as a conservator of the peace, the statutes to that effect being quoted *in extenso;* that he also has certain additional common-law powers and obligations to protect the judges, and to personally attend them on their visits to that State; that, therefore, no statutory authority of the United States for the attendance on Mr. Justice FIELD by Neagle, and for Neagle's personal presence on the scene, was necessary; and that that statute constituted Neagle a peace-officer to keep the peace of the United States. This line of argument seems to us wholly untenable. By way of preliminary remark, it may be well to say that, so far as the simple fact of Neagle's attendance on Mr. Justice FIELD, and the fact of his personal presence are concerned, no authority, statutory or otherwise, was needed. He had a right to be there; and, being there, no matter how or why, if it became necessary to discharge an official duty, he would be just as much entitled to the protection of Section 753 of the Revised Statutes as if he had been discharging an official duty in going there. The fallacy in the use made of Section 788 in the argument just outlined is this: That section gives to the officers named the same measure of powers when in the discharge of their duties as those possessed by the sheriffs, it is true; but it does not alter the duties themselves. It does not empower them to enlarge the scope of their labors and responsibilities, but only adds to their efficiency within that scope. They are still, by the very terms of the statute itself, limited to the execution of "the laws of the United States," and are not in any way, by adoption, mediate or immediate, from the Code or the common law, authorized to execute the laws of Cali-

fornia. The statute, therefore, leaves the matter just where it found it.

If the act of Terry had resulted in the death of Mr. Justice FIELD, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own Supreme Court Justice, or even to inquire into the heinous offense through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged, and that independently of any official character; the situation being the same in the case of any citizen. But, if no, how stands the matter then? The killing of Terry was not by the authority of the United States, no matter by whom done, and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the State courts to be tried. The question then recurs, would it have been a crime against the United States? There can be but one answer. Murder is not an offense against the United States except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial, and give immunity from any liability to trial, where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes

committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a *habeas corpus* proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or employe or agent is sought to be enforced. We have not entered upon that question because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may Constitutionally go, which could only be properly determined when directly presented by the record in a case before the court for adjudication.

For these reasons, as briefly stated as possible, we think the judgment of the court below should be reversed, and the prisoner remanded to the custody of the sheriff of San Joaquin county, Cal.; and we are the less reluctant to express this conclusion because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice, and that, even if the appellee had been indicted and had gone to trial upon this record, God and his country would have given him a good deliverance.

FULLER, C. J., concurred in this dissent.

When the Circuit Court of the United States for the Northern District of California ordered Neagle's discharge, the opinion of Circuit Judge SAWYER was printed in 28 AMERICAN LAW REGISTER 585, with an extended annotation on the summary relief which a Court of the United States could extend to an officer of the United States arrested by State authorities for some act done in the performance of his duty. Such collisions ought not to occur, but the incidents of the cases cited, as well as of this Neagle case, show that they will occur as long as popular feeling is not restrained by knowledge of the law and of the consequences of disobedience; see *U. S.* v. *Doss* (1872), 11 AMER. LAW REG. (N. S.) 320 and 28 Id. 647.

The judgment of affirmance in Neagle's case was unanimous upon the power to release Neagle; *supra* page 696. It was the importance of this point together with the improbability of another ex-judge or any citizen, so far forgetting the necessary respect to the judiciary, which caused the annotation in 28 AMERICAN LAW REGISTER 624-53, to be confined to this fundamental point. There could not have well

been any dissent, after the long line of cases which had been actually decided, and for this reason, no doubt, Justice MILLER does not go fully into a review of them. And this is made the more plain by the confession of sovereign power in the United States, even if not expressly, but only necessarily implied from the language of the Constitution, which is made in the dissenting opinion, *supra*, pages 696–7.

The uncertainties which this judgment will eventually remove are presented by Justice LAMAR (dissenting) as merely a construction of the law in pursuance of which Neagle acted. From this narrowness of view, no doubt the Chief Justice and Justice LAMAR failed to apply to one of the two important questions into which this construction is divided by Justice MILLER, the rule to which they assented in the *Original Package Case*. That is, in the latter case, these Justices construed a power conferred upon Congress, without any words affecting the States, to be so exclusive as to prevent the States from acting, even if Congress should refuse to act. But here, the executive power, broadly conferred upon the President amongst other things, but not in terms exclusively for the faithful execution of the laws, would be restrained to such ways and means as have been specifically indicated by Congressional action. That has not been the rule of construction since MARSHALL, in *McCulloch* v. *Maryland* (see the quotation, *supra*, pages 423, 706), pointed out that a Constitutional necessity was not an absolute necessity, nor one to be remedied by the most simple and direct means alone, but by those which were useful and advantageous. In other words, the question of necessity related to the end and only to that extent controlled the means.

Want of space near the close of a volume, compels the postponement of an examination into the executive power, and the rights and duties of United States Marshals. The latter will assume a greater importance in the event of the passage of an act or acts of Congress, further regulating the election of Representatives in Congress.

JOHN B. UHLE.

ABSTRACTS OF RECENT DECISIONS.

CONTRACTS.

Public policy forbids the organization of an association for the purpose of increasing the price or decreasing the production of a commodity in general use, such as candles, and a claim based upon an agreement under which such an association has been formed, can receive no aid from a court of justice. *Emery* v. *Ohio Candle Co.*, S. Ct. Ohio, May 6, 1890.

DECEIT.

Diligent inquiry as to the truth or falsity of representations made by a person seeking to exchange certain stock of a corporation owned by him, for property of another, need not be made by the the latter, in order to enable him to maintain an action of deceit based upon the falsity of such representations. *Cottrill* v. *Crum*, S. Ct. Mo., May 19, 1890.